

Corruption and strategies to fight it

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Kofi Annan, the then Secretary General of the United Nations, had this to say about corruption:

“Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organised crime, terrorism and other threats to human security to flourish. This evil phenomenon is found in all countries big and small, rich and poor but it is in the developing world that its effects are most destructive. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a government’s ability to provide basic services, feeding inequality and injustice, and discouraging foreign investment and aid. Corruption is a key element in economic under-performance, and a major obstacle to poverty alleviation and development.”¹

[PAUSE] Axiomatically then no effort should be spared to ensure that this scourge is rooted out.

¹ Quoted in *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) at para 167; and *Zuma v The Office of the Public Protector* 2020 JDR 2248 (SCA) at para 1.

Corruption manifests in different but sometimes related ways. Examples are: paying or soliciting a bribe in order to escape, or let someone escape, a criminal sanction; paying a kickback as a consideration for the improper award of a government contract, which is usually paid from amounts received as proceeds of an improperly awarded government contract – this also takes the form of an upfront payment of a bribe to secure the improper award of a contract (both examples being what I would call procurement related corruption); [PAUSE] beneficial ownership secrecy, which is where the real owner of a company is improperly concealed to avoid certain legal consequences whilst improperly reaping the fruits of ownership; where a government official takes advantage of their position so as to place a family member in an advantages position, i.e. nepotism; the listing of ghost employees on government payrolls and siphoning off monies paid by government as salaries to these ghost workers; and, relatedly, the listing of ghost social grant beneficiaries and receiving their supposed benefits.²

I do not have statistics, but I would be surprised if procurement related corruption does not rank high up there. And it is what I will focus on. But before I do so, let me take a detour. “The norm-setting constitutional provision on the procurement of goods and services by organs of state is section 217(1) of the Constitution. This section provides that when an organ of state ‘contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective’.”³ To

² Stephen Morris *Forms of Corruption*

³ *Minister of Finance v Afribusines NPC*[2022] ZACC 4 at para 97.

state the obvious, these prescripts are meant to redound to the benefit of the general populace. To be more direct, they are meant to improve the lives of ordinary people. A concomitant to the improvement of people's lives is the restoration and maintenance of their human dignity, one of the founding values of the South African Constitution.⁴

Compliance with the constitutional imperative that requires procurement in accordance with the five factors prescribed by section 217(1) is not an end in itself. These factors are meant to ensure that the public reaps the best possible benefits from procurement by organs of state. The public are the true beneficiaries of state procurement. Phoebe Bolton says “the policy and philosophy behind government contracting [is] that the state must provide for its citizens”.⁵ Of course, the reference to “citizens” in the South African context may not be that accurate as – for example – permanent residents who are not citizens enjoy most rights and freedoms enjoyed by citizens.⁶ According to Bolton, the reason for the constitutional imperative that the five factors be complied with is “to safeguard the integrity of the government procurement process”.⁷ Also, the imperative goes some distance towards ensuring the prudent use of public resources.⁸ It “is also aimed at preventing corruption”.⁹

⁴ In this regard, the Constitution provides that “[t]he Republic of South Africa is one sovereign, democratic state founded on the values ... [of] human dignity, the achievement of equality and the advancement of human rights and freedoms”.

⁵ Bolton *The Law of Government Procurement in South Africa* (LexisNexis Butterworths, 2007) p. 5.

⁶ See, for example, *Khosa v Minister of Social Development, Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC).

⁷ Bolton above n 51 at 57.

⁸ Compare Bolton *id.*

⁹ *Id.*

Not infrequently, non-compliance with procurement prescripts may appear to be innocuous and thus inconsequential. Courts and other players in the fight against corruption should be wary and not take these at face value or adopt the stance that there is nothing behind them or that nothing will come of them. Froneman J writing for a unanimous Constitutional Court in *Allpay 1* rightly cautions against this. He says:

“[D]eviations from fair process may themselves all too often be symptoms of corruption or malfeasance in the process. In other words, an unfair process may betoken a deliberately skewed process. Hence insistence on compliance with process formalities has a three-fold purpose: (a) it ensures fairness to participants in the bid process; (b) it enhances the likelihood of efficiency and optimality in the outcome; and (c) it serves as a guardian against a process skewed by corrupt influences.”¹⁰

[PAUSE] Corruption inheres within the field of procurement. And as Kofi Annan, whom I quoted earlier, says, it is so widespread as to know no boundaries.

A significant part of the problem facing us is the creation of an expansive field over which government procurement takes place. By this I mean either procuring from private actors, services that need not be procured from that source (what I would call procurement for procurement’s sake), or allowing procurement to take place in

¹⁰ *Allpay 1* above n **Error! Bookmark not defined.** at para 27.

circumstances that conduce to corruption. This expansive field affords corruption fertile ground to thrive. Let me give examples of what I am talking about. Growing up in my rural village of Mount Frere, uTat'uNgqewu, our next door neighbour and my father's age contemporary, and uBhut' Maqabuka who was based in the next village after mine, operated government owned road graders and constantly maintained the gravel roads in my village and surrounding villages. We no longer have those graders. I would be surprised if the discontinuance of this service is not true of other areas in the country. Today for the smallest road maintenance works, we go out to tender, generally at huge cost. I do realise, of course, that I am treading on dangerous terrain here. Who knows: experts in the field might say that it is cheaper or administratively prudent for government to do it this way. As a lay person, I cannot but wonder if government could not by now have bought its own graders and other road maintenance equipment many times over. Likewise, I would wonder what the prudence is; I am not saying there isn't. but I would wonder. Even if my example of graders and other road maintenance equipment may be shown to have fault lines, my point – which I believe cannot be faulted – is much wider than that. It is that government must not procure goods or services from the private sector where it is not necessary to do so. It may not be necessary either because government has its own capability or can easily acquire the capability. I accept that government procurement cannot be eliminated, but – to the extent possible – it needs to be curtailed.

I now move on to the next example, an example that typifies circumstances that conduce to corruption. Of course, some – if not most – among us here today are academics. I

am aware of the particular aversion academics have to anecdotal material. Academics insist on empirical data. I will rely on anecdotal material regardless. I would be surprised if none among us here identify with it. We sometimes hear how – in the context of procurement that requires only three quotations and not public tender – the functionary concerned will get quotes from X and Y, well knowing that she or he wants to give the job to W. She or he will then secretly furnish X and Y's quotations to W and ask her or him to "quote". W will lower her or his quote by a fractional margin below the lowest of the two quotations and get the job. The Auditor-General, who comes after the event, will not be any the wiser because on paper everything will appear strictly to comply with the set legal prescripts; the required three quotations will be there.

Also, we often get reports about the procurement of the simplest of goods that are readily available at supermarkets from individuals who source these goods from the very supermarkets. This, at huge cost. Before some of you bite my head off and ask why our government must enrich established and mainly white supermarkets, instead of empowering the economically disadvantaged majority of South Africans, please hear me out. Without suggesting that the focus of our transformative enterprise is not where it should be, I suggest that this focus should also be at the level of ensuring that, that majority becomes owners of well-functioning supermarkets, which will become tomorrow's established supermarkets. That way the majority can then compete at that level with the other supermarkets. In that event, government will be better placed to cap quotations to levels that are related to what is available in the real – not

artificial – marketplace. At present, government is forced to understand that the person it procures from, and who does not own a supermarket, is bound to come in at much higher margins than what is available in the real market.

Another example of circumstances that conduce to corruption is the use of variation orders in construction. In the interests of time, I will say no more on this. But I am willing to substantiate during question time.

None of the issues I have just discussed constitute my main suggestion. And perhaps some of these issues will, in any event, be addressed by the Public Procurement Act, which – as I understand – is still a Bill at this stage. My main suggestion is this. More than ad hoc action taken by, for example, our prosecution services, other law enforcement agencies and corruption busting actors like the Public Protector, I am for tough action emanating right from the top; action that is calculated to minimise or – if I were to be overly optimistic – to root out corruption. Action that decidedly disincentives and makes corruption unattractive. Action from the top that equally hits at the top; and action that does so systematically and consistently. For as long as corruption fighting efforts are seen to be ad hoc and directionless in terms of who they focus on, many amongst the corrupt will take their chances and say I will not be one of the unlucky ones. How many times have people been successfully prosecuted and sentenced for corruption? How many times has the Public Protector made findings against the corrupt? Can we count the number of times the corrupt have been divested of their ill-gotten gains by courts at the instance of the Asset Forfeiture Unit? How

many times has the Special Investigative Unit successfully instituted civil action against the corrupt resulting in huge proprietary loss by them? Although the lexicon of the Auditor-General sometimes euphemistically calls acts that may well meet the threshold of corruption “irregular expenditure” (perhaps doing so because of mandate constraints), do we know how many times her office has – to use an Americanism – called out those guilty of such acts? There are stringent prescripts on procurement set by legislation, including subordinate legislation in the form of Treasury Regulations. Has that legislation helped halt the runaway train of corruption? I could go on and on. All these typify the help available in our legal arsenal. But the question is: are we anywhere near rooting out corruption? So, if we truly want to root out corruption, it cannot be business as usual. That time has passed. Something drastic, something outside of the ordinary needs to be done. If we have tough, concrete, systematic, consistent action emanating from the top and hitting at the top, its effects are sure to filter to the rest of our public service. Of course, I am not unmindful that there is the age-old question: *sed quis custodiet ipsos custodes* (but who will guard the guards themselves)?

In case this suggestion is seen as a mere platitude, let me give the example of, Lee Kuan Yew, Singapore’s first Prime Minister after attainment of independence. He is credited for having turned Singapore from a so-called third world country¹¹ to a developed country within one generation.¹² At the centre of what drove his success was good

¹¹ [footnote aversion to term].

¹² [insert title of article we picked up on him and name of author].

governance in general and, in particular, an aversion to, and a fierce fight against, corruption.¹³ A saying about him and those he governed with goes: Lee and his colleagues “were incorruptible because they were incorruptible”.¹⁴ The fight he waged against corruption did not spare those at the top. Here is what he said in this regard:

“Once a political system has been corrupted right from the very top leaders to the lowest rungs of the bureaucracy, the problem is very complicated. The cleansing and disinfecting has to start from the top and go downwards in a thorough and systematic way. It is a long and laborious process that can be carried out only by a very strong group of leaders with the strength and moral authority derived from unquestioned integrity.”¹⁵

There; a concrete example. Not pie in the sky; not platitudes.

I should not be misunderstood. I am not suggesting that we should no longer utilise the arsenal of laws that we have at our disposal. Quite the contrary. The various corruption fighting organs of state – most of which are mandated by the Constitution or other laws to exercise their functions without fear, favour or prejudice – must make a concerted effort to carry out their mandates efficiently and effectively. So, yes, our police service must effectively and efficiently investigate crimes of corruption and expeditiously charge those reasonably suspected of prosecutable corruption. Yes, our prosecuting

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authority must so streamline its processes that prosecutions commence and end without undue delay. Yes, the judiciary must devise clear strategies to ensure that unnecessary backlogs and delays in the adjudicative process are eliminated. The Auditor-General must maintain her efforts of calling out those who are guilty of acts of irregular expenditure in the public service, which – as I said earlier – is a euphemism for corruption in some instances. And she must invoke the new legislation enacted to ensure that hers is now no longer a near toothless bark, but is coupled with an effective bite.¹⁶ Yes, the Public Protector, the SIU, the Asset Forfeiture Unit and other organs of state that are part of the corruption busting enterprise must wage a concerted war on corruption. Likewise, private agencies that fight corruption and are deeply embedded in the collective conscience of those who still do have a conscience not to be corrupt must continue with their various ways of being a thorn on the side of the corrupt.

[PAUSE]

Let me conclude by saying I sincerely hope that for the sake of our children and our children's children, there will come a day when our beloved South Africa will be counted amongst nations that have the least levels of corruption, and that we will not have to wait and wait and wait for the dawning of that day.

¹⁶ [insert the name of the Act that you earlier referred me to]. In sum, this Act gives the Auditor-General the power to [briefly state the powers; you may bullet them or use (a), (b), etc]. Team, has this legislation taken effect; what was its date of commencement (not promulgation, as some Acts may be promulgated but take time to commence or take effect).